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NO. 85-5542

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ALVIN BERNARD FORD, or CONNIE FORD, individually, and as next friend on behalf of ALVIN BERNARD FORD,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT

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104 pp

QUESTIONS PRESENTED

I.

WHETHER THE HUMANITARIAN POLICY DEFERRING EXECUTION OF AN INSANE PRISONER UNTIL HIS SANITY IS RESTORED SHOULD BE ELEVATED TO AN EIGHTH AMENDMENT RIGHT?

II.

WHETHER, IF AN EIGHTH AMENDMENT RIGHT TO BE SANE AT THE TIME OF EXECUTION EXISTS, FLORIDA'S PRESENT PROCEDURE ADEQUATELY PROTECTS IT?

III.

WHETHER, PURSUANT TO THIS COURT'S CONTROLLING PRECEDENT OF SOLESBEE v. BALKCOM, 339 U.S. 9 (1950), FLORIDA'S PROCEDURE FOR DETERMINING SANITY OF CONDEMNED PRISONERS MEETS THE REQUIREMENTS OF FOURTEENTH AMENDMENT PROCEDURAL DUE PROCESS?

TABLE OF CONTENTS

TABLE OF CONTENTS - CONTINUED

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES - CONTINUED

TABLE OF AUTHORITIES - CONTINUED

TABLE OF AUTHORITIES - CONTINUED

TABLE OF AUTHORITIES - CONTINUED

TABLE OF AUTHORITIES - CONTINUED

TABLE OF AUTHORITIES - CONTINUED

TABLE OF AUTHORITIES - CONTINUED

TABLE OF AUTHORITIES - CONTINUED

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OPINIONS BELOW

Respondent accepts the Petitioner's citations. In addition, the Florida Supreme Court's opinion on the issues raised in this case is reported as Ford v. Wainwright, 451 So.2d 471 (Fla. 1984), and it is set out at A 5.

JURISDICTION

Respondent accepts the Petitioner's statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts the Petitioner's statement.

STATEMENT OF THE CASE

On July 21, 1974, the Petitioner, Alvin Bernard Ford, murdered a police officer in the course of an attempted robbery. After years of litigation, his direct and collateral appeals were concluded. Ford v. State, 374 So.2d 496 (Fla. 1979), cert. denied, Ford v. Florida, 445 U.S. 972 (1980) [direct appeal]; Ford v. State, 407 So.2d 907 (Fla. 1981) [a

consolidated collateral appeal and original habeas corpus action]; Ford v. Strickland, 676 F.2d 434 (11th Cir. 1982) [panel decision] and Ford v. Strickland, 696 F.2d 804 (11th Cir), cert. denied, 464 U.S. 865 (1983) [a federal habeas corpus denial which was affirmed by a panel and ultimately the en banc Eleventh Circuit]. Ford was also a named party in Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000 (1981).

In late 1983, the governor of Florida appointed a commission of three psychiatrists pursuant to the provisions of Fla. Stat. §922.07 (1983) to evaluate Ford's sanity for execution. The commissioners were directed to examine Ford for the

purpose of determining whether he understood the nature of the death penalty and why it was to be imposed upon him. The commissioners examined Ford on December 19, 1983. They also reviewed materials submitted to them by counsel for Ford, inspected Ford's prison cell and spoke to his guards, and reviewed his prison medical records. Each commissioner then submitted a written report to the governor stating his findings.

In his Statement of the Case, Ford describes the findings as "conflicting." The record shows otherwise, for all three commissioners independently concluded that Ford understood the death penalty and why it was to be imposed on him.

Dr. Ivory reported:

> I formed the opinion that the inmate knows exactly what is going on and is able to respond promptly to external stimuli. In other words, in spite of the verbal appearance of severe incapacity, from his consistent and appropriate general behavior he showed that he is in touch with reality . . . (A 98)

> This inmate's disorder, although severe, seems contrived and recently learned. My final opinion, based on observation of Alvin Bernard Ford, on examination of his environment, and on the spontaneous comments of group of prison staff, is that the inmate does comprehend his total situation including being sentenced to death, and all of the implications of that penalty. (A 100)

Dr. Mhatre's report to the governor stated:

> The conversation with the guards at Florida State Prison who have been working with Mr. Ford, furnished the

following information. His jibberish talk and bizarre behavior started after all his legal attempts failed. He was then noted to throw all his legal papers up in the air and was depressed for several days after that. He especially became more depressed after another inmate, Mr. Sullivan, was put to death and his behavior has rapidly deteriorated since then. In spite of this, Mr. Ford continues to relate to other inmates and with the guards regarding his personal needs. He has also borrowed books from the library and has been reading them on a daily basis. A visit to his cell indicated that it was neat, clean and tidy and well organized . . .

It is my medical opinion that Mr. Ford has been suffering from psychosis with paranoia, possibly as a result of the stress of being incarcerated and possible execution in the near future. In spite of psychosis, he has shown ability to carry on day to day activities, and relate to his fellow inmates and guards, and appears to understand what is happening around him. It is my medical opinion

> that though Mr. Ford is suffering from psychosis at the present time, he has enough cognitive functioning to understand the nature and the effects of the death penalty, and why it is to be imposed upon him. (A 103)

Dr. Afield concluded:

> . . . Although this man is severely disturbed, he does understand the nature of the death penalty that he is facing, and is aware that he is on death row and may be electrocuted. The bottom line, in summary is, although sick, he does know fully what can happen to him. (A 105-106)

By signing a death warrant for Ford on April 20, 1984, the governor determined Ford was sane within the meaning of Fla. Stat. §922.07(1). Ten days prior to Ford's scheduled May 31, 1984, execution, Ford's counsel filed in the state trial court a motion for hearing and

appointment of experts for a determination of competency to be executed. The motion was denied. The Florida Supreme Court affirmed the trial court's order. Ford v. Wainwright, 451 So.2d 471 (Fla. 1984). The Florida Supreme Court held that the gubernatorial proceeding outlined in Fla. Stat. §922.07 is the exclusive means for determining competency to be executed and there was no right to a judicial determination (A 9-10).

Ford's counsel then filed his second Petition for Writ of Habeas Corpus in the United States District Court, Southern District of Florida, on May 25, 1984 (A 11-124). The State filed a response (A 125-140). The District Court heard legal

argument on May 29, 1984. At the conclusion of the hearing, the court announced its ruling orally. It found the petition constituted an abuse of the writ (A 164). Alternatively, on the merits, the District Court ruled the gubernatorial proceeding under Fla. Stat. §922.07, was properly followed and relief was denied (A 164).

A divided panel of the United States Court of Appeals for the Eleventh Circuit granted a certificate of probable cause and a stay of execution on May 30, 1984. Ford v. Strickland, 734 F.2d 538 (11th Cir. 1984). By a vote of 6-3, this Court denied the State's motion to vacate the stay. Wainwright v. Ford, ___ U.S. ___, 104 S.Ct. 3498 (1984).

After a full briefing and oral argument, a panel of the Eleventh Circuit affirmed, by a 2-1 vote, the District Court's order. Ford v. Wainwright, 752 F.2d 526 (11th Cir. 1985). The majority held this Court's opinion in Solesbee v. Balkcom, 339 U.S. 9 (1950), which had been recently applied by a panel of the Eleventh Circuit in Goode v. Wainwright, 731 F.2d 1482 (11th Cir. 1984), was controlling. The portion of Solesbee v. Balkcom, supra, quoted by the Court of Appeal as dispositive, states:

> We are unable to say that it offends due process for a state to deem its governor an 'apt and special tribunal' to pass upon a question so closely related to powers that from the beginning have been entrusted to governors.

Id. at 12 (quoted at A 187).

Rehearing en banc was denied (A 202-203). This Court granted Ford's Petition for Certiorari on December 9, 1985 (A 207).

SUMMARY OF THE ARGUMENT

I. The execution of Alvin Bernard Ford, a state death row inmate who has had over eleven years to challenge his conviction, and whose sanity to be executed has been determined by Florida's governor pursuant to Fla. Stat. §922.07 (1983), will not offend the cruel and unusual punishment clause of the Eighth Amendment.

At common law, it was recognized an insane man should not be executed, as a matter of humanitarian principle. This was not considered an individual right, but rather, an appeal was made to the discretion of the tribunal having authority to postpone sentence. Solesbee v. Balkcom, 339 U.S. 9 (1950). Thus, the Framers

could not have intended that this social policy be incorporated in the Eighth Amendment as a fundamental personal right.

Deferment of an insane man's execution does not fall within the scope of the Eighth Amendment for several reasons. First, it operates as a temporary reprieve only and not as a permanent bar to execution, unlike this Court's past interpretation of the Eighth Amendment as setting substantive limits on punishment. Second, there has never been a single agreed-upon rationale underlying the policy of postponing the execution of an insane man, so there is no compelling premise to support Ford's argument that his execution would offend the dignity of man.

Third, an examination of contemporary standards as revealed by present state statutes, confirms that the common law view equating deferment of the execution of the insane with clemency is still accepted today. Finally, this Court should not find an Eighth Amendment right because post-conviction insanity occurs at a stage outside the criminal process after the validity of the conviction and sentence are no longer in dispute.

II. If this Court determines the Eighth Amendment prohibits the execution of the insane, the Florida procedure outlined in Fla. Stat. §922.07 (1983), adequately prevents it. Ford was examined by an appointed commission of three psychiatrists who reported to the

governor their conclusion that he was sane. Counsel for Ford was present at the examination, and was permitted to submit written material to the commissioners and to the governor. Ford is not entitled to a federal habeas corpus evidentiary hearing to determine his present sanity because he is not challenging his conviction. The function of habeas corpus is to secure release from illegal custody. The issue of post-conviction sanity is outside the criminal process. Less stringent procedural requirements apply. The governor, acting as a neutral and detached decisionmaker, with the aid of psychiatrists, was a proper party to make the determination that Ford was sane for purposes of execution.

Florida's standard of competency to be executed is that a prisoner understands the nature of the death penalty and why it is to be imposed upon him. This is an adequate standard, for Ford has no further right of access to the courts.

III. In Solesbee v. Balkcom, 339 U.S. 9 (1950), this Court upheld a procedure like Florida's for determining sanity to be executed as comporting with due process. Solesbee is still valid and it should be dispositive of Ford's claim that Fla. Stat. §922.07 fails to satisfy procedural due process. Solesbee held the determination of post-conviction insanity could be deemed an executive function, akin to the clemency authority. It has not been

overruled by Gardner v. Florida, 430 U.S. 349 (1977), because Gardner deals with sentence imposition, whereas the issue of competency to be executed arises long after sentencing and is not part of the judicial process.

Due process is flexible and what process is due depends upon the situation. The Florida procedure allows the governor to make the determination of sanity to be executed, subsequent to the receipt of reports from a commission of appointed experts. The procedure was followed in this case and all three members of the commission concluded Ford was sane. The balancing test of Mathews v. Eldridge, 424 U.S. 319 (1976) is satisfied. Ford's private interest

is insubstantial because he has had full review of his conviction. The State has a valid and compelling interest in an end to litigation. The risk of error is minimized by the Florida statute which provides for experts to advise the governor.

To require an adversarial judicial proceeding, subject to appellate review, will invite endless litigation. Solesbee v. Balkcom, supra, should be reaffirmed by upholding the Florida procedure for determining competency to be executed.

ARGUMENT

I.

THE HUMANITARIAN POLICY DEFERRING EXECUTION OF AN INSANE PRISONER UNTIL HIS SANITY IS RESTORED IS NOT A FUNDAMENTAL RIGHT OF THE INDIVIDUAL REQUIRING EIGHTH AMENDMENT PROTECTION.

Alvin Bernard Ford murdered a helpless, wounded police officer--Dimitri Walter Ilyankoff--on July 21, 1974, by shooting him in the back of the head at close range. He was tried and sentenced to death. His challenges to the validity of his conviction and sentence were rejected by the state and federal courts in the ten year period following the commission of the crime.

Although the legality of the conviction is no longer at issue, Ford's sentence has not been carried

out. His remaining challenge to the State's right to execute him is his assertion that the Eighth Amendment proscribes the execution of an insane person as "cruel and unusual" punishment. Ford alleges he is presently insane[1] and the Florida procedure for determining sanity to be executed is inadequate to satisfy the federal due process standards which would inexorably follow if the court accepts his Eighth Amendment claim. The State maintains the humanitarian principle deferring execution of an insane person is not a substantive Eighth

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[1]This claim was never presented to any court until ten days prior to his scheduled 1984 execution, although according to his pleadings, his mental problems began in December, 1981.

Amendment right of the condemned. Moreover, even if the court determines there is such a right, the Florida gubernatorial proceeding adequately protects it.

The Florida procedure, which was followed in this case, is outlined in Fla. Stat. §922.07 (1983). When a condemned prisoner's sanity is in question, the governor appoints a commission of three psychiatrists. The commissioners are directed to examine the prisoner and advise the governor whether he understands the nature of the death penalty and why it is to be imposed upon him. In this case, all three psychiatrists reported to the governor that Ford was sane within the meaning of the statute. By signing Ford's death

warrant, the governor determined he was sane for purposes of execution.

The present Florida procedure reflects the common law policy. As described in this Court's decision in Solesbee v. Balkcom, 339 U.S. 9, 13 (1950), "the heart of the common law doctrine has been that a suggestion of insanity after sentence is an appeal to the conscience and sound wisdom of the particular tribunal which is asked to postpone sentence." Stated another way, it is "an appeal to the humanity" of a tribunal to postpone execution. People v. Preston, 345 Ill. 11, 177 N.E. 761 (1931); People v. Eldred, 103 Colo. 334, 86 P.2d 248 (1938). At common law, a stay of execution due to insanity was discretionary with the court

or the executive in the exercise of clemency; there was no absolute right to a hearing and no provision for judicial review. People v. Riley, 37 Cal.2d 510, 235 P.2d 381, 384 (1951). The decision to spare an insane person from execution was not deemed to be an individual right and the Framers of the Constitution could not have intended that it be included within the "cruel and unusual" punishment clause of the Eighth Amendment. The primary concern of the drafters of the Eighth Amendment was to proscribe torture and other barbarous methods of punishment. Estelle v. Gamble, 429 U.S. 97, 101 (1976). The "cruel and unusual punishment" clause was taken from the English Bill of Rights adopted

in 1689,[2] and due to the prevailing view that the clause only prohibited certain methods of punishment, it was rarely invoked throughout the nineteenth century. Granucci, Nor Cruel and Unusual Punishments Inflicted: The Original Meaning, 57 Cal.L.Rev. 839 (1969).

The fact that no court has ever held execution of the insane to be forbidden by the Eighth Amendment is itself evidence that the Framers did not so intend. The common law prohibition against executing the insane operates only as a temporary reprieve; since the validity of the original judgment and sentence is not

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[2]See, J. Story, On the Constitution of the United States, §1908 at 680 (3rd Ed. 1858), cited in Furman v. Georgia, 408 U.S. 238, 317 (1972).

at issue, the prisoner can be executed once his sanity has been restored. The postponement of an execution is not within the scope of the Eighth Amendment, which has always been considered to be directed at the method or kind of punishment imposed for the violation of criminal statutes. Powell v. Texas, 392 U.S. 514, 531-532 (1968). It bans punishments that are barbaric and excessive in relation to the crime committed, Coker v. Georgia, 433 U.S. 584, 592 (1976), and imposes substantive limits on what can be made criminal and punished as such. Gregg v. Georgia, 428 U.S. 153, 172 (1976), citing Robinson v. California, 370 U.S. 660 (1962). See also, Ingraham v. Wright,

430 U.S. 651, 667 (1977). To accept Ford's position would not prevent his eventual execution, but would mean only that states cannot execute condemned prisoners who are allegedly insane until their sanity is restored. Such a deferment of execution does not merit Eighth Amendment protection, and, in Florida, is properly left to the governor.

Aside from the fact that the issue before this Court is not one which would fall within the traditional purview of the Eighth Amendment, an examination of the common law reasons and those urged by Ford establishes there is no consistently applied rationale underlying the policy

against executing the insane.[3] There are various justifications which all reflect humanitarian concerns and are in the nature of clemency; these justifications do not cancel the punishment or suggest its imposition was wrong.[4] This general lack of agreement supports the State's position that the policy does not create an Eighth Amendment right in the individual, for how can execution of the insane be said to offend the concept of human dignity when there is no consensus as to why this is so?

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[3] Gray v. Lucas, 710 F.2d 1048, 1054 (5th Cir. 1983) [. . . the underlying social principle . . . is unclear and not the subject of general agreement . . .]

[4] The following discussion of the common law is based upon Hazard and Louisell, Death, the State and the Insane: Stay of Execution, 9 UCLA L.Rev. 381 (1962).

Blackstone and Hale explained the rule by saying if the prisoner is sane he may urge some reason why the sentence should not be carried out. 4 Blackstone, Commentaries, 395-396 (13th Ed. 1800). Ford restates this in ccntemporary terms as access to the courts: a prisoner must be competent to meaningfully exercise his right of access to collateral remedies.[5] Ford acknowledges he has fully availed himself of his judicial remedies; his pleadings allege his mental

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[5]The existence of this "right" is questionable; this Court has held there is no right to counsel to pursue discretionary applications for review, Ross v. Moffitt, 417 U.S. 600 (1974), and counsel's failure to file such an application cannot constitute the basis for a claim of ineffectiveness. Wainwright v. Torna, 455 U.S. 586 (1982).

incompetency began in December, 1981, seven years after his trial. Every conceivable claim which could be advanced on Ford's behalf has been raised. The filing of any further collateral proceedings would be an abuse of process and an abuse of the writ. Rule 9(b), Rules Governing 28 U.S.C. §2254 proceedings. Ford has no standing to assert the rights of others on this issue. Fisher v. United States, 425 U.S. 391 (1976).[6]

Blackstone also stated that the prisoner's insanity is itself sufficient punishment, but this is not convincing, for at common law

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[6]Moreover, since collateral proceedings review the conviction, and it is constitutionally required that a prisoner have been competent at his trial, Dusky v. United States, 362 U.S. 402 (1960), the access to the courts argument is not persuasive.

it was recognized that when the prisoner regained his sanity he was again subject to execution. This is true today, for Fla. Stat. §922.07 (1983), provides that if a prisoner is found insane, after treatment, he may be restored to sanity and executed.

Coke theorized the rule is one of humanity--a refusal to take the life of the unfortunate prisoner, Coke, Third Institute 6 (1797). This rationale has been characterized thusly:

> Is it not an inverted humanitarianism that deplores as barbarous the capital punishment of those who have become insane after trial and conviction, but accepts the capital punishment for sane men, a curious reasoning that would free a man from capital punishment only

> if he is not in full possession of his senses?

Phyle v. Duffy, 34 Cal.2d 144, 159, 208 P.2d 668, 676-77 (1949) (Traynor, J., concurring).

Coke has also suggested there is no deterrent value in executing an insane person. Ford restates this theory by alleging execution of the insane is excessive for it does not serve the penological justifications of retribution and deterrence. This argument concerns a societal interest which does not create a right in the prisoner, who is still subject to execution upon restoration to sanity. Furthermore, these interests are served. Ford is to be executed for murder, and his execution should deter potential murderers. The purpose of retribution

is to place value on the life of the victim and it exists as an alternative to private vengeance. Van den Haag, In Defense of the Death Penalty: A Legal-Practical-Moral Analysis, 14 Crim. L. Bull. 5 (1978). The societal objective of retribution, the enforcement of laws, matters more than the individual wish and is quite independent of it. Van den Haag, Punishing Criminals (1975). In light of the fact that Ford's sanity has been determined pursuant to Fla. Stat. §922.07 (1983) the State has adequately protected society.

The theological reason advanced for the rule at common law is that the condemned should be afforded one last opportunity to make his peace

with God. The religious rationale is difficult to assess in a judicial proceeding, particularly in modern society where there is no consensus as to doctrine. Accordingly, Ford restates this principle as an entitlement to face death and die with dignity. He cites to studies which describe the deaths of terminally ill patients who are victims of circumstances beyond their control. E.g., E. Kubler-Ross, On Death and Dying (1969) ["in the following pages is an attempt to summarize what we have learned from our dying patients in terms of coping mechanisms at the time of a terminal illness", page 33]. The situation of a dying patient cannot be analogized to Alvin Bernard Ford's. Ford chose to place himself

on death row at the time he committed murder and he has had many years to ponder his fate.[7] A death from illness is not comparable to capital punishment:

> To be put to death because one's fellow humans find one unworthy to live is a very different thing from reading the end of one's journey naturally, as all men must. To be condemned, expelled from life by one's fellows, makes death not a natural event or a misfortune but a stigma of final rejection. The knowledge that one has been found too odious to live is bound to produce immense anxiety. Threatened by disease or danger, we usually feel that death is in an indecent hurry to overtake us. We appeal to friends and physicians to save us, to

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[7] Certainly, he has had far more time than the few seconds he allowed his unfortunate victim.

> help delay it, and we expect a comforting response. Death is the common enemy, and it calls forth human solidarity. Not for the condemned man. He is pushed across by the rest of us.

Van den Haag, Punishing Criminals, page 212 (1975).

Therefore, Ford has presented no compelling justification to support his claim that he has an individual right, protected by the Eighth Amendment's concept of human dignity, to have a stay of execution based on post-conviction insanity. The arguments Ford has advanced as to contemporary standards of decency are based on the existence of state laws which provide the insane are not to be executed. The existence of these laws does not ipso facto create an Eighth Amendment right; an

examination of the process they provide shows that in modern times, as at common law, the determination of post-sentence insanity is a matter for the executive[8] or the prisoner's custodian,[9] to inquire into for humanitarian reasons.

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[8] Georgia Code Ann., §17-10-61; N.Y. Corr. Law, §665 (1983 Supp.); Md. Ann. Code, Art. 27 §75(c); Mass. Gen. Laws Ann., Ch. 279 §62 (1984 Supp.).

[9] Ariz. Rev. Stat. Ann., §13-4021 (1982); Ark. Stat. Ann., §43-2622 (1977); Calif. Penal Code, §3701 (1979); Conn. Gen. Stat., §54-101 (1980); Kan. Stat., §22-4006 (Supp. 1981); Miss. Code Ann., §99-19-57 (1983 Supp.); Neb. Rev. Stat., §29-2537 (1979); Nev. Rev. Stat., §176.425 (1983); New Mex. Stat. Ann., §31-14-4 (1978); Ohio Rev. Code Ann., §2949.28 (1982 Supp.); Okla. Stat. Ann., §1005 (1983); Utah Code Ann., §77-19-13(1) (1982); Wyo. Stat., §7-13-901 (1984 Cum. Supp.).

In bringing the court's view to bear on the subject, the State submits Ford has failed to establish a right under the Eighth Amendment. In Spinkellink v. Wainwright, 578 F.2d 582, 617-619 (1978), cert. denied, 440 U.S. 976 (1979), the defendant argued that Florida's clemency procedures must be governed by the due process clause of the Fourteenth Amendment. The Fifth Circuit rejected the claim, finding the clemency power vested exclusively in the executive branch and it was a discretionary decision, not the business of judges. As authority, the court cited Solesbee v. Balkcom, 339 U.S. 9 (1950), in which this Court held the function of determining post-conviction insanity

was properly vested in the state governor. Like clemency, the fact there is long-standing recognition that the insane should not be executed until their sanity is restored, see, Gregg v. Georgia, 428 U.S. 153, 200 n. 50 (1976), does not suffice to elevate the principle to a right etched in constitutional stone. Just as not all errors of state law in a capital sentencing proceeding are violative of the Eighth Amendment, Barclay v. Florida, 463 U.S. 939 (1983), the determination of post-conviction sanity need not be viewed as an Eighth Amendment right. As the court noted in Rhodes v. Chapman, 452 U.S. 337, 351 (1981), the courts should proceed cautiously in making Eighth Amendment judgments because revisions

cannot be made (short of a constitutional amendment) in the light of further experience.

This Court's conclusions cannot be the subjective views of the judges but should be formed by objective factors such as history and the action of state legislatures. Rhodes v. Chapman, 452 U.S. 337, 346-47 (1981). As the State has discussed, history shows that the policy against executing the insane is primarily for humanitarian reasons and it is not viewed as a right of the condemned prisoner. The existing statutes of the states provide for procedures akin to the executive clemency function.

There are valid reasons for distinguishing the determination of post-conviction insanity from earlier

stages of the judicial process.

The State, when it prosecutes someone for a crime, must prove the defendant was sane at the time of its commission, for sanity at the time of the crime is an element of guilt itself.[10] Likewise, sanity at the time of trial is essential to an effective defense, and trial must be postponed if a defendant is incompetent. However, post-trial insanity commencing after judgment operates only to delay execution and so it is not deserving of the same

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[10]The court's holding in Ake v. Oklahoma, ___ U.S. ___, 105 S.Ct. 1090 (1985), that an indigent defendant must have access to the psychiatric assistance necessary to prepare an effective defense at trial has no bearing on the instant case, which concerns post-conviction insanity.

protections afforded at the trial stage. Comment, Execution of Insane Persons, 23 So.Cal.L.Rev. 246 (1950).

In Roberts v. United States, 391 F.2d 991 (D.C. Cir. 1968), the court was presented with a prisoner's contention that due to his mental condition he would not be able to conform to prison regulations and so he would not become eligible for parole. He argued the prospect of a long incarceration was, as to him, cruel and unusual punishment forbidden by the Eighth Amendment. The court rejected the claim, noting there is nothing unique in the development of mental or emotional disorders as a result of imprisonment. Writing for the court, Circuit Judge (now Chief Justice) Burger quoted

Trop v. Dulles, 356 U.S. 86, 100 (1958):

> While the state has the power to punish, the [Eighth] Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed, depending on the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.

The court concluded that since the case involved no technique "outside the bounds of these traditional penalties," the claim was without merit. Roberts v. United States, supra, at 992.

The present case, as did Roberts, involves a penalty within "traditional bounds" which has been justly imposed. Ford's Eighth Amendment claim of "right" to a

determination of post-conviction of insanity must likewise be held to be lacking in merit. "All that is good is not commanded of the Constitution and all that is bad is not forbidden by it." Palmer v. Thompson, 403 U.S. 217, 228 (1971).

II.

SHOULD THE COURT FIND THERE IS AN EIGHTH AMENDMENT RIGHT TO BE SANE AT THE TIME OF EXECUTION, THE PRESENT FLORIDA PROCEDURE ADEQUATELY PROTECTS IT.

If this Court does conclude there is an Eighth Amendment right to be sane at the time of execution, the State maintains the procedures set forth in Fla. Stat. §922.07 (1983), adequately vindicate it. Ford invoked the statutory procedure. Three psychiatrists examined him, and all three doctors reported to the governor in writing that Ford was competent to be executed, i.e., he understood the nature of the death penalty and why it was to be imposed upon him. Ford's counsel was allowed to be present at the examination,

which, constitutionally is not even required.[11] There is absolutely nothing in the statute to prevent defense counsel from submitting any pertinent material to the governor. Ford excerpts a sentence from the Florida Supreme Court's decision in Goode v. Wainwright, 448 So.2d 999 (Fla. 1984), to support this portion of his argument, but the opinion states only, "He [Goode] complains about the governor's publicly announced policy of excluding all advocacy on the part of the condemned from the process of

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[11] See, Smith v. Estelle, 602 F.2d 694, 708 (5th Cir. 1979); vacated on other grounds but cited with approval as to point that counsel not entitled to be present at psychiatric examination. Estelle v. Smith, 451 U.S. 454, 470, n. 14 (1981).

determining whether a person under sentence of death is insane." 448 So.2d 999. In fact, Ford's counsel did prepare materials which were submitted to and considered by the commissioners (A 103, 105), and he asserted in the District Court he had been able to submit information to rebut the conclusions of the commissioners to the governor. (A 75-76, n. 6). ["In the 922.07 proceeding before the governor, counsel and Mr. Ford demonstrated that the conclusions of the . . . commission members . . . were flawed"].

Nevertheless, Ford insists he is entitled to a federal evidentiary determination of competency because the Florida proceeding was not conducted in a court and therefore

the presumption of correctness of 28 U.S.C. §2254(d) is inapplicable. The State maintains a determination of Ford's competency in a federal habeas corpus proceeding would be wholly inappropriate. Pursuant to 28 U.S.C. §2254(a) a person in custody pursuant to a state court judgment may apply for habeas corpus "only on the ground that he is in custody in violation of the Constitution . . . of the United States." The federal court's habeas corpus jurisdiction is defined and limited by the statute. Engle v. Issac, 456 U.S. 107, 110, n. 1 (1982); Sumner v. Mata, 449 U.S. 539, n. 2 (1981). Section 2254 is "primarily a vehicle for attack by a confined person on the legality of his custody and the

traditional remedial scope of the writ has been to secure absolute release--either immediate or conditional--from that custody." Lee v. Winston, 718 F.2d 888, 892 (4th Cir. 1983). Ford is not attacking the validity of his judgment and sentence or the lawfulness of the Respondent's custody, since even if there is a right not to be executed while insane, once sanity is restored, the execution can proceed. The essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and the traditional function of the writ is to secure release from illegal custody. Preiser v. Rodriguez, 411 U.S. 475, 484 (1973). The sole function of the writ is to grant

relief from unlawful imprisonment or custody, and it cannot be used properly for any other purpose. Hill v. Johnson, 539 F.2d 439 (5th Cir. 1976); Caldwell v. Line, 679 F.2d 494 (5th Cir. 1982); Delaney v. Giarrusso, 633 F.2d 1126, 1128 (5th Cir. 1981). There is no universal right to litigate a federal claim in a federal court; the Constitution makes no such guarantee. Allen v. McCurry, 449 U.S. 90, 103-104 (1980); Stone v. Powell, 428 U.S. 465 (1976).

The determination of sanity to be executed is not a stage of the criminal process, as a death-sentenced prisoner is not subject to execution until the criminal process has been completed. Events which are not critical stages of a criminal

proceeding are not subject to stringent procedural requirements to vindicate constitutional rights.

In Gerstein v. Pugh, 420 U.S. 103 (1975), this Court held that while the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest, full adversary hearing safeguards were not necessary. An informal procedure could be used and appointment of counsel was not required.

In Shadwick v. Tampa, 407 U.S. 345 (1972), this Court held municipal court clerks qualified as neutral and detached magistrates capable of issuing arrest warrants for purposes of the Fourth Amendment, and concluded not all warrant authority must reside

exclusively in a lawyer or judge.

It has been determined the Sixth Amendment right to counsel attaches only when formal judicial proceedings are initiated against an individual. Kirby v. Illinois, 406 U.S. 682 (1982). Thus, prison inmates closely confined in administrative detention while being investigated for criminal activity were held not to be entitled to the appointment of counsel, for there is no Sixth Amendment right until adversary proceedings are initiated. United States v. Gouveia, ___ U.S. ___, 104 S.Ct. 2292 (1984). The right to counsel, once it has attached, concludes after direct appeal. A criminal defendant has no right to counsel to pursue discretionary applications for review,

Ross v. Moffitt, 417 U.S. 600 (1974), and counsel's failure to file such an application cannot constitute the basis for a claim of ineffectiveness. Wainwright v. Torna, 455 U.S. 586 (1982).

Therefore, any Eighth Amendment right Ford has to be sane when he is executed can be addressed in a non-judicial setting, since the issue arose after the criminal (and in this case, extensive collateral) proceedings were completed. The decision as to post-conviction sanity has been properly vested by Florida in the governor, for, as this Court held in Solesbee v. Balkcom, 339 U.S. 9 (1950), the decision bears a close affinity not to trial for a crime but to clemency powers in

general. The Constitution is satisfied because the decisionmaker is a neutral and detached official. Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971). Therefore, Ford's arguments as to the applicability of 28 U.S.C. §2254(a) are not material to the issue since there is no judicial proceeding required under the Constitution.[12]

Ford's additional argument that the Florida competency standard is inadequate because it does not require that the prisoner be able to prepare for death and consult with counsel is

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[12] If this Court does find a judicial proceeding is required, the Florida courts, rather than the federal District Court, should be given the first opportunity to act. Cabana v. Bullock, ___ U.S. ___, 54 U.S.L.W. 4105, 4109 (op. filed January 22, 1986).

a repeat of his death with dignity and access to the courts arguments. As the State has pointed out earlier, Ford has litigated this case for years and he has already exercised all his rights of access to the courts. Concerning the dubious[13] nature of Ford's claim to a right to prepare for death, the State submits the statute's requirement that the condemned prisoner understand the nature of the death penalty and why it is to be imposed on him[14] satisfies this purpose.

The competency standard asserted by Ford is simply an invitation to endless litigation. The legislature

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[13] See pages 33-35, supra.

[14] Fla. Stat. §922.07(1)

has wisely set a standard which is appropriate to the situation and left the determination to the governor. The Florida statutory standard is the standard cited in LaFave and Scott, Handbook on Criminal Law (1972) at page 303:

> The common law was quite vague on the meaning of insane in this context [time of execution], but it is usually taken to mean that the defendant cannot be executed if he is unaware of the fact that he has been convicted and that he is to be executed. Stated another way, he must be so unsound mentally as to be incapable of understanding the nature and purpose of the punishment about to be executed upon him.

It is also the standard in at least one other state, Illinois, where the applicable statute, Illinois Rev. Stat. (1982), Ch. 38, §1005-2-3(a),

provides:

> A person is unfit to be executed if because of a mental condition he is unable to understand the nature and purpose of such sentence.

The State maintains the Eighth Amendment requires no more.

III.

PURSUANT TO CONTROLLING PRECEDENT OF THIS COURT, SOLESBEE v. BALKCOM, 339 U.S. 9 (1950), FLORIDA'S PROCEDURE FOR DETERMINING SANITY OF CONDEMNED PRISONERS MEETS THE REQUIREMENTS OF FOURTEENTH AMENDMENT PROCEDURAL DUE PROCESS.

Ford argues in the alternative that even if there is no Eighth Amendment right to be sane at the time of execution, Florida has created such a right and its procedure for protecting it fails to satisfy due process. The State maintains this Court's decision in Solesbee v. Balkcom, 339 U.S. 9 (1950), wherein it held a gubernatorial determination of sanity to be executed satisfies due process, is still good law and should therefore be applied as controlling precedent to reject Ford's

contentions.

The decision in Solesbee was preceded by Nobles v. Georgia, 168 U.S. 515 (1897). In Nobles, the court held the question of insanity after verdict did not give rise to an absolute right to have the issue tried before a judge and jury, but was addressed to the discretion of the judge. The court concluded the manner in which the sanity question was to be determined was purely a matter of legislative regulation. This decision led to Solesbee v. Balkcom, 339 U.S. 9 (1950), where the court held the Georgia procedure whereby the governor determined the sanity of an already convicted defendant did not offend due process:

We are unable to say that it offends due process for a state to deem its governor an "apt and special tribunal" to pass upon a question so closely related to powers that from the beginning have been entrusted to governors. And here the governor had the aid of physicians specially trained in appraising the elusive and often deceptive symptoms of insanity. It is true that governors and physicians might make errors of judgment. But the search for truth in this field is always beset by difficulties that may beget error. Even judicial determination of sanity might be wrong.

* * * * *

To protect itself society must have power to try, convict, and execute sentences. Our legal system demands that this governmental duty be performed with scrupulous fairness to an accused. We cannot say that it offends due process to leave the question of a convicted person's sanity to the solemn responsibility of a state's highest executive with authority to invoke

> the aid of the most skillful class of experts on the crucial questions involved.

Id. at 12-13.

Solesbee was reaffirmed by this Court's decision in Caritativo v. California, 357 U.S. 549 (1958).

Ford argues Solesbee is no longer valid because it was decided at a time when the right/privilege distinction was thought to be determinative of an individual's constitutional rights, a concept which has since been rejected. See, e.g., Graham v. Richardson, 403 U.S. 365, 374 (1971). However, the thrust of the court's holding in Solesbee was the determination of post-conviction insanity could properly be deemed an executive function because it was akin to

clemency and it did not offend due process for the governor, with the aid of physicians, to make the determination. The court's decision did not turn on the right/privilege distinction but on the authority traditionally vested in the executive. Its analysis was adopted in Spinkellink v. Wainwright, 578 F.2d 582, 617-619 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979). There the court, which in addition to Solesbee, cited Schick v. Reed, 419 U.S. 256 (1974) and Meachum v. Fano, 427 U.S. 215 (1976), held that where the governor and the cabinet, pursuant to established procedures, chose to consider whether the defendant was entitled to mercy, there was no Fourteenth Amendment due process

violation, for clemency is an executive function. In the case sub judice, it should be recognized that enforcement of the law, like clemency, is traditionally an executive function. Accordingly, the governor, who is charged with carrying out the sentence by signing the warrant, is the proper party to determine sanity in this context.

Ford also argues the decision in Gardner v. Florida, 430 U.S. 349 (1977), revisited Williams v. New York, 337 U.S. 241 (1949), and since Solesbee cited to Williams, Solesbee must be reevaluated as well. The State maintains this Court's holding in Gardner that the sentencing phase of a capital murder trial, as well as the phase on guilt or innocence,

must satisfy the requirements of the due process clause, does not call into question the continued validity of Solesbee. In both Williams and Gardner, the court was concerned with the imposition of sentence. As Justice White noted, concurring in Gardner, "The issue in this case . . . involves the procedure employed by the state in selecting persons who will receive the death penalty." Gardner v. Florida, supra, 430 U.S. at 363. By contrast, Solesbee dealt with the determination of post-sentence insanity, which is not part of the judicial process, and it is done subsequent to the imposition of sentence. It is a discretionary stage with which, as stated in Gregg v. Georgia, 428 U.S. 153, 199

(1976), the courts are not concerned. [. . . "a defendant who is convicted and sentenced to die may have his sentence commuted by the governor . . . The existence of these discretionary stages is not determinative of the issues before us . . . Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution."] Therefore, since Fla. Stat. §922.07 (1983) is not part of the sentence imposition or process, pursuant to this Court's still controlling decision in Solesbee, it satisfies due process.

Ford's argument that Florida has created a right and it is subject to procedural due process protections is a restatement, in different terms,

of his contention that Solesbee v. Balkcom is no longer valid, since under Solesbee, Fla. Stat. §922.07 (1983), does satisfy due process.[15] The State therefore reiterates its position that Solesbee is dispositive.

In any event, if the State is free to define and limit an entitlement, there seems no good reason why it should not be equally free to define the procedure that goes with that entitlement. Tribe, American Constitutional Law, page 536 (1978). An examination of Fla. Stat. §922.07 (1983), reveals that the statute does no more than provide that the prisoner

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[15] Goode v. Wainwright, 731 F.2d 1482, 1483 (1984), [the Eleventh Circuit, citing Solesbee, held the Florida statute meets the minimum standards required by procedural due process.]

or someone on his behalf may inform the governor of his alleged insanity. This procedure has superseded the earlier Florida decisions which held an application to the trial court may be made for a determination of sanity. Ford v. Wainwright, 451 So.2d 471, 475 (Fla. 1984). The only expectation that has been created by first the common law and then the statute is the opportunity to petition for a sanity determination.

Ford's argument that he is entitled to the same due process protections that are applicable to a determination of competency to stand trial ignores the qualitative and obvious distinctions between the trial on guilt or innocence and a last-ditch attempt to avoid execution

many years later after all other legal efforts have failed. At trial, competency is necessary to ensure the effectiveness of the fundamental rights inherent therein such as the right to counsel, to confront and cross-examine witnesses, the decision whether to testify, etc. In short, as a matter of Fourteenth Amendment fundamental fairness, an accused must be competent at trial so he will be able to participate meaningfully in the judicial proceeding in which his life is at stake. Pate v. Robinson, 383 U.S. 375 (1966); Ake v. Oklahoma, ___ U.S. ___, 105 S.Ct. 1087, 1093 (1985). It is appropriate that the court before whom he is to be tried determines his competency to stand trial.

By contrast, at the time of execution, the prisoner has exhausted his remedies and has no further avenues of relief. It is well established, as the phrase implies, that "due process" is flexible and calls for such procedural protections as the particular situation demands; not all situations calling for procedural safeguards require the same kind of procedure. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); see also, Hewitt v. Helms, 459 U.S. 460 (1983). In the instant case, the statutory procedure which provides for the appointment of a commission of experts, an examination at which counsel for the prisoner may be present, and a submission of a report to the governor, is sufficient.

Due process does not always require an adversarial hearing. Williams v. Wallis, 734 F.2d 1434, 1438 (11th Cir. 1984); Hickey v. Morris, 722 F.2d 543, 549 (9th Cir. 1983). In Hortonville Joint School District No. 1 v. Hortonville Education Association, 426 U.S. 482 (1976), the court held that where the state law vested a governmental function in the school board and had an interest in it remaining there, the school board's review of teacher firing decisions satisfied due process. The court further noted there is a presumption of honesty and integrity in policy-makers with decisionmaking power. Id. at 497. Likewise in this case the legislature has enacted a statutory procedure which vests the

determination of sanity to be executed in the governor, subsequent to the receipt of a report from a commission of experts, and there is a presumption the executive has acted with integrity. This presumption is well founded in the instant case, for the commission appointed by the governor unanimously concluded Ford was sane.

Counsel for Ford and for amici criticize the fact that the mental examination was just for a half-hour period and contend this was insufficient to make an accurate diagnosis. They appear to ignore the facts that the commissioners also spoke to prison personnel who had daily contact with Ford, reviewed his prison medical records, observed the condition of his cell, and considered material

submitted by Ford's attorneys, which included reports by Doctors Kaufman and Amin (A 98-106).[16] The three psychiatrists drew the conclusion that Ford understood the nature of the death penalty and why it was to be imposed upon him and reported this to the governor in writing.

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[16]For example, Dr. Afield's report states: "I had an in depth conference with both attorneys for the inmate and reviewed the medical records that they had available. I talked at length with a variety of guards who had dealings with the inmate and reviewed the contents of Mr. Ford's writings in his cell. I discussed his medical condition with the prison psychiatrist and examined the man in the presence of all counsels and two other state-appointed psychiatrists. My examination consisted of a complete mental status examination. Subsequently, I spoke at length with attorney Burr and reviewed complete medical records from the prison, which included psychiatric evaluations and reports from several prison psychologists. I reviewed in depth Dr. Kaufman's findings."

In Barefoot v. Estelle, 463 U.S. 880 (1983), this Court refused to accept the view propounded by the American Psychiatric Association that experts cannot accurately predict the future dangerousness of a convicted criminal. The court noted there were doctors who disagreed with this position and would be quite willing to testify on the matter at a sentencing proceeding. Id., 463 U.S. 899. In this case, three doctors followed the Florida procedure for determining competency to be executed and were able to make a diagnosis. In Barefoot, this Court additionally concluded that psychiatric testimony on future dangerousness need not be based on personal examination and may be given in response to hypothetical

questions. Therefore, in the instant case, the methodology used, which included a mental examination, did not violate due process.

Further evidence that the Florida procedure provides for accurate fact finding is available from the case of Gary Eldon Alvord, a death row inmate who invoked Fla. Stat. §922.07 (1983), in November, 1984. In Alvord's case, the governor appointed two of the same three commissioners who had examined Ford, Doctors Ivory and Mhatre, to examine Alvord. (Respondent's Appendix 1-4). Based on their reports, the governor determined Alvord was insane and committed him for treatment. (Respondent's Appendix 5-7).

Florida's statutory procedure therefore satisfies the three-part balancing test of Mathews v. Eldridge, 424 U.S. 319 (1976). At this point in the proceeding--post trial, post appeal, and post collateral attack, Ford's private interest is insubstantial. He has had many years to prepare for death, and he is not entitled to further access to the courts to attack his conviction.

The State has a valid and compelling interest in an end to litigation and the carrying out of its lawfully imposed sentence. In the present case, the District Court found Ford's habeas corpus petition to be an abuse of the writ (A 164), as did the dissenting judge on the Eleventh Circuit's stay panel

(A 179).[17] Ford's pleadings allege his mental deterioration began in December, 1981, yet he never sought treatment, nor did he bring the matter of his alleged insanity to any court until ten days prior to his scheduled 1984 execution (A 4). The Florida statutory procedure prevents such abuses, for by permitting the governor to be the decisionmaker with the aid of an appointed commission of psychiatrists, eleventh hour postponements of executions will not be obtained by frivolous claims of incompetence.

The risk of an erroneous deprivation is negligible since the statute provides for experts to advise the

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[17] The merits panel did not reach the issue (A 184, n. 1).

governor. In Williams v. Wallis, 734 F.2d 1434 (11th Cir. 1984), the court upheld Alabama's nonadversary procedures for determining whether insanity acquitees should be released from state mental hospitals, noting that medical professionals have no bias against release and it can be safely assumed they are disinterested decisionmakers. The court stated "neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments" [ ]. Id. at 1439.

In Gilmore v. Utah, 429 U.S. 1012 (1976), the court terminated a stay of execution, after reviewing state records, having concluded "the State's determinations of his [Gilmore's]

competence knowingly and intelligently to waive any and all such rights were firmly grounded." The concurring opinion pointed out that the state determinations were based on reports of doctors ordered by the court to examine Gilmore prior to his trial and reports of prison psychiatrists who had seen him after his conviction. Id. at 429 U.S. 1015, n. 5. Since in Gilmore the court was willing to accept state determinations of competency in a situation where the prisoner was waiving his appellate rights less than five months after committing his crimes, it does not offend due process to allow a state governor, aided by a commission of experts to determine competency to be executed many years later.

See also, Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978) [dismissal of student for academic reasons requires expert evaluation and is not readily adapted to the procedural tools of judicial or administrative decision-making.] Accordingly, in this case where pursuant to Fla. Stat. §922.07 a commission of three psychiatrists examined the Petitioner, found him sane, so advised the governor, and the governor thereupon issued a death warrant, a proper balance was struck.

To accept amici's and Ford's contention that due process requires the State to provide full adversarial judicial proceedings, subject to appellate review, is to invite never-ending litigation. Ford's execution

was stayed on May 30, 1984. By the time this case is resolved, two more years will have gone by. The concern expressed by this Court long ago in Nobles v. Georgia, 168 U.S. 398, 405-406 (1897), is just as valid today:

> If it were true that at common law a suggestion of insanity after sentence created on the part of a convict an absolute right to a trial of this issue . . . it would be wholly at the will of the convict to suffer any punishment whatever, for the necessity of his doing so would depend solely upon his fecundity in making suggestion after suggestion of insanity, to be followed by trial upon trial.

The State urges this Court to re-affirm Solesbee v. Balkcom, supra, by holding that the Florida procedure for determining competency to be

executed satisfies procedural due process.

CONCLUSION

Wherefore, based on the foregoing reasons and authorities, the Respondent respectfully requests that the decision of the Circuit Court of Appeals for the Eleventh Circuit be affirmed.

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APPENDIX

STATE OF FLORIDA

OFFICE OF THE GOVERNOR

EXECUTIVE ORDER NUMBER 84-214

(Commission to Determine Mental Competency of Inmate)

WHEREAS, the Governor has been informed that GARY ELDON ALVORD, an inmate at Florida State Prison, under sentence of death, may be insane, and

WHEREAS, pursuant to Section 922.07, Florida Statutes, it is necessary to appoint a Commission of three competent, disinterested psychiatrists to inquire into the mental condition of the aforesaid inmate, and to suspend the execution of the death sentence imposed upon said inmate during the course of the medical examination;

NOW, THEREFORE, I, BOB GRAHAM, as Governor of the State of Florida, by virtue of the authority vested in me by the Constitution and Laws of the State of Florida, specifically Section 922.07, Florida Statutes, do hereby promulgate the following Executive Order, effective immediately:

1. The following persons, who are competent, disinterested psychiatrists, are hereby appointed as a Commission to examine the mental condition of GARY ELDON ALVORD, an inmate at Florida State Prison, pursuant to Section 922.07, Florida Statutes:

1. Peter B.C.B. Ivory, M.D.
2. Gilbert N. Ferris, M.D.
3. Dr. Umesh M. Mhatre

2. The above-named psychiatrists as and constituting the "Commission to Determine the Mental Condition of GARY ELDON ALVORD" shall examine GARY ELDON ALVORD to determine whether he understands the nature and effect of the death penalty and why it is to be imposed upon him as required by Section 922.07. The examination shall take place with all three psychiatrists present at the same time. Counsel for the inmate and the State Attorney may be present but shall not participate in the examination in any adversarial manner.

3. The psychiatric examination shall be conducted expeditiously. Upon completion of the examination, said Commission shall report to me their findings.

4. The expenses involved in this examination shall be borne by the Department of Corrections.

5. The execution of the sentence imposed upon GARY ELDON ALVORD by the Circuit Court of the 13th Judicial Circuit, Hillsborough County, on April 9, 1974, is hereby suspended pending the outcome of the examination of the mental condition of said inmate.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed at Tallahassee, the Capitol, this 20th day of November, 1984.

/s/ Bob Graham
GOVERNOR

ATTEST:

/s/ George Firestone
SECRETARY OF STATE

STATE OF FLORIDA

OFFICE OF THE GOVERNOR

EXECUTIVE ORDER NUMBER 84-222

(Amendment of Executive Order 84-214)

WHEREAS, in accordance with the provisions of Section 922.07, Florida Statutes, Executive Order 84-214 was entered appointing three competent, disinterested psychiatrists (the "Commission") to examine the mental condition of GARY ELDON ALVORD, an inmate at Florida State Prison under sentence of death, and

WHEREAS, the Commission has completed its examination of the said GARY ELDON ALVORD, and, in reviewing its report the Governor has determined that GARY ELDON ALVORD is not mentally competent under the

terms of Section 922.07, and

WHEREAS, Section 922.07 requires that an inmate under sentence of death found to be incompetent must be committed to the state hospital for the insane until such time as the inmate is found to be competent, and

WHEREAS, there is no reason for the continuation of the Commission since the purpose for which it was created has been completed; and in accordance with Section 922.07, Florida Statutes,

NOW, THEREFORE, I, BOB GRAHAM, as Governor of the State of Florida, by virtue of the authority vested in me by the Constitution and laws of the State of Florida, do hereby

promulgate the following executive order:

1. GARY ELDON ALVORD is remanded to the Florida State Hospital for the insane at Chattahoochee where he shall be kept in secure custody.

2. Peter Ivory, M.D., Gilbert Ferris, M.D., and Umesh Mhatre, M.D., are hereby relieved of all further duties and responsibilities under Executive Order 84-214.

3. The stay of execution of the sentence imposed upon GARY ELDON ALVORD, granted by said Executive Order 84-214, remains in effect until further order pursuant to Section 922.07.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed at Tallahassee, the Capitol, this 29th day of November, 1984.

/s/ Bob Graham
GOVERNOR

ATTEST:

/s/ George Firestone
SECRETARY OF STATE